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UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:) Docket No. 11-0088
)
Kathy Jo Bauck (a/k/a "Kathy Cole")
a/k/a "K.J. Cole"), Allan R. Bauck)
(a/k/a "A.R. Back" a/k/a)
"A.R. Bauk"), Corinne A. Peters,)
Janet Jesuit, and Peggy Weise,)
individuals, d/b/a Puppy's on)
Wheels, a/k/a "Puppies on Wheels")
and "Pick of the Litter," also d/b/a)
"Pine Lake Enterprises," "KJ's Pets,")
"New York Kennel Club," and "New)
York Kennel Club, Inc.," and "Pine)
Lake Enterprises, Inc., a Minnesota)
domestic corporation,)
)
Respondents) **Decision and Order as to Peggy Weise**

PROCEDURAL HISTORY

On December 8, 2010, Kevin Shea, Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], instituted this disciplinary administrative proceeding by filing a Complaint. The Administrator instituted the proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-1.151)

[hereinafter the Rules of Practice]. The December 8, 2010, Complaint did not include Ms. Weise as a respondent, but, on June 15, 2011, the Administrator amended the Complaint adding Ms. Weise as a respondent (First Amended Complaint). On July 18, 2011, Ms. Weise filed a response to the First Amended Complaint in which she denied the material allegations of the First Amended Complaint.

On September 14, 2011, the Administrator entered into consent decisions with all respondents except Ms. Weise. On September 23, 2011, the Administrator filed a Status Report stating: (1) “the . . . proceeding has concluded, except as otherwise provided in [the September 14, 2011, Consent Decisions]” and (2) “no further activity in the . . . proceeding is anticipated and thus, except as otherwise provided in [the September 14, 2011, Consent Decisions], this proceeding is believed to be concluded.” (Status Report at 1-2.)

On September 27, 2011, Administrative Law Judge Janice K. Bullard [hereinafter the ALJ] dismissed with prejudice the First Amended Complaint as it relates to Ms. Weise (Order Dismissing Respondent Peggy Weise at 3). On October 20, 2011, the Administrator filed APHIS’s Motion for Reconsideration [hereinafter Motion to Reconsider] requesting that the ALJ rescind the September 27, 2011, Order Dismissing Respondent Peggy Weise and cancel the scheduled hearing (Mot. to Reconsider at 3). On November 8, 2011, Ms. Weise filed a response opposing the Administrator’s Motion to Reconsider. On December 14, 2011, the ALJ denied the Administrator’s Motion to Reconsider (Order Denying Reconsideration of Order Dismissing Respondent Peggy Weise with Prejudice).

On January 11, 2012, the Administrator filed APHIS’s Appeal Petition and Brief in Support Thereof [hereinafter Appeal Petition]. On February 6, 2012, Ms. Weise filed a response

opposing the Administrator's Appeal Petition. On February 8, 2012, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration of the Administrator's Appeal Petition and a decision.

DECISION

The Administrator contends the ALJ erred by dismissing with prejudice the First Amended Complaint. The Administrator asserts the September 23, 2011, Status Report and the October 20, 2011, Motion to Reconsider are motions to withdraw the First Amended Complaint, which the ALJ erroneously failed to grant:

Although the status report did not explicitly refer to "withdrawing" the complaint against Weise, complainant made clear in the motion for reconsideration, which was filed at the ALJ's express request, that withdrawal of the complaint was the type of action being sought. Alternatively, instead of dismissing Weise without prejudice, the order should be modified simply to withdraw the complaint against respondent Weise.

Appeal Pet. at 8 n.5. The right of a party instituting a proceeding under the Rules of Practice to voluntarily withdraw a complaint and reinstitute the proceeding should be preserved, except under rare circumstances.¹ However, neither the Administrator's Status Report nor the Administrator's Motion to Reconsider is a motion to withdraw the First Amended Complaint.

The Administrator's September 23, 2011, Status Report is not a motion; it is merely the Administrator's report to the ALJ that "no further activity in the . . . proceeding is anticipated" and that "this proceeding is believed to be concluded." The Administrator's Motion to Reconsider is a motion; however, the Motion to Reconsider contains only a single reference to withdrawing the First Amended Complaint, as follows:

¹*In re Sierra Kiwi, Inc.* (Rulings), 58 Agric. Dec. 330, 332-34 (1999); *In re Fresh Prep, Inc.* (Ruling on Certified Question), 58 Agric. Dec. 683, 687-90 (1999).

[C]omplainant respectfully requests that the [O]rder [Dismissing Respondent Peggy Weise] be rescinded and that the hearing be cancelled. In in [sic] the event it is deemed necessary, complainant does not object to withdrawing the first amended complaint as to respondent Peggy Weise, or, alternatively, to issuance of an order so doing.

Mot. to Reconsider at 3. I do not find that the Administrator's Motion to Reconsider is a motion to withdraw the First Amended Complaint. Instead, the Motion to Reconsider requests that the ALJ rescind the September 27, 2011, Order Dismissing Respondent Peggy Weise and cancel the scheduled hearing. While the Administrator asserts he would not object to withdrawal of the First Amended Complaint as an alternative disposition of the proceeding, the Administrator makes clear that withdrawal is to be effectuated only if the ALJ finds such a disposition necessary. Apparently, the ALJ did not find such a disposition necessary.

For the foregoing reasons, the following Order is issued.

ORDER

1. The Administrator's January 11, 2012, Appeal Petition is dismissed.
2. The ALJ's September 27, 2011, Order Dismissing Respondent Peggy Weise and the ALJ's December 14, 2011, Order Denying Reconsideration of Order Dismissing Respondent Peggy Weise with Prejudice are affirmed.

Done at Washington, DC

February 9, 2012

[Redacted]
William G. Jenson
Judicial Officer